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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 560

WILLIAM J. LAVERICK,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No._____

WILLIAM J. LAVERICK,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above-entitled case on July 15, 1965.[1]

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[1]The judgment below affirmed the convictions of petitioner (Appellant in No. 14874), Harrison F. Tryon (Appellant in No. 14875) and Malcolm Schaeffer (Appellant in No. 14876). Petitioner herein has been advised that a separate petition for certiorari is being filed on behalf of Schaffer.

OPINION BELOW

The opinion of the Court of Appeals, printed in Appendix C hereto, *infra*, is unreported.[2]

JURISDICTION

The judgment of the Court of Appeals was filed on July 15, 1965. On August 5, 1965, this Court entered an order extending time to file petition for writ of certiorari to and including September 13, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1), and Supreme Court Rules 19-1(b) and 22-2.

QUESTIONS PRESENTED

1. Whether there were unlawful and unauthorized interceptions of telephone calls within the meaning of Section 605 of the Federal Communications Act (48 Stat. 1103, 47 U.S.C. § 605), so as to render inadmissible in federal court information obtained thereby and divulgence of such intercepted conversations.

2. Whether petitioner's Constitutional rights have been so violated as to require this Court to exercise its supervisory powers over the fair administration of criminal justice where

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[2]The entire record on appeal has been certified and filed with the Court. References to the printed portions of such record shall be as follows: Appendix for Appellant (pp. 1a-126a) shall be designated as "Pet"; and Appendix for Appellee (pp. 1b-96b) designated as "Govt". Unprinted transcripts of the record will state the witness, with the (item number) of the Docketed Papers on Appeal in which such testimony is found.

(a) the principal government witness, although the initiating party to telephone conversations, was asked on direct examination and testified only to the "substance" of such conversations, making no reference to the fact that such calls were intercepted and recorded by the F.B.I., and the trial judge, over objections, thereafter allowed an agent of the F.B.I., who was not a party to such conversations, to read into evidence as part of the government's main case the entire transcripts of the intercepted calls which the agent had prepared from the recordings thereof; and

(b) where such principal government witness admitted on cross-examination that such telephone calls had been intercepted and recorded by the F.B.I., and the trial judge, over objections, allowed such witness to use transcripts prepared by the F.B.I. of such recordings, supplied him by government counsel during the course of cross examination, to "refresh his recollection" while on cross-examination.

3. Whether the petitioner's rights under the Fourth and Fifth Amendments to the Federal Constitution were violated by the ruling of the trial judge in allowing the F.B.I. agent, over objections, to read into evidence the transcripts of the telephone conversations which he prepared from the recordings of such telephone calls made without the knowledge or consent of petitioner or his alleged co-conspirators.

CONSTITUTION AND STATUTES INVOLVED

The constitution and statutory provisions involved are the Fourth and Fifth Amendments to the Federal Consti-

tution, and Title 47 United States Code § 605 (48 Stat. 1103). They are printed in Appendix A, *infra*.

STATEMENT

Petitioner and two others, Harrison F. Tryon and Malcolm Schaeffer, co-appellants below, were convicted on all counts of a three-count indictment. Count I charged that petitioner and Tryon, aided and assisted by Schaeffer, in violation of 18 U.S.C. §371, conspired together during the period from April 25, 1962 to on or about July 12, 1962, to commit offenses against the United States, namely, the acceptance of money by petitioner and Tryon with the intention of having their decisions influenced with regard to matters coming before them in their official capacities as employees of the United States, in violation of 18 U.S.C. §202, and acceptance by them of compensation for services rendered with respect to matters in which the United States had an interest, pending before an agency of the United States contrary to the provisions of 18 U.S.C. §281. Count II charged petitioner and Tryon with having actually committed the substantive offense proscribed by Section 202, in which they were aided and abetted by Schaeffer in violation of 18 U.S.C. §2. Count III similarly charged an actual violation of the offense described in Section 281.

Petitioner, at the time of his arrest on July 12, 1962, was Director, Production Engineering Department for the United States Army Signal Material Support Agency (USASMSA), at Fort Monmouth, N. J., having jurisdiction over some 450 employees, including about 103 supervisory personnel. (Laverick (38) 15-17) Tryon was Chief, Logistics Engineering Division, Maintenance Engineering

Department, USASMSA, Fort Monmouth, N. J. (Tryon (38) 306-307) Schaeffer had been a manufacturer's representative for about four years and, prior to that time, had been employed for a ten year period at Fort Monmouth in the Maintenance Engineering Department. In March, 1962, he was retained as the East Coast representative of Consad, Inc., Monterey Park, California, by its president Robert S. Snoyer. (Schaeffer (38) 157-160).

This case initiated on the night of June 7, 1962, when Snoyer, encouraged and accompanied by Charles Nicodemus, Washington reporter for the Chicago Daily News,[3] appeared before the F.B.I. in Washington, D. C., to report a possible bribe solicitation made the previous day by Schaeffer. (Snoyer (36) 168, 227, 230, 234, 239) Snoyer became quite disturbed over this Washington meeting, lasting five hours; he felt very roughly and rudely treated by the F.B.I. agents; he was not accustomed to being looked at in that manner and harshly interrogated with repeated warnings that he could be prosecuted if any of his statements were untrue; he felt pushed around, upset, alone and unsure of himself. (Snoyer (36) 284, 287-288, 351) He was called the next morning at 8 a.m., five hours after

[3]Snoyer became acquainted with him through several telephone calls from Nicodemus in May, 1962, during which he learned that Nicodemus, acting as the press' "watchdog," was investigating improper procurement practices,, and was dedicated to the improvement of opportunity of small contractors to obtain Government business. (Snoyer (36) 169-173) Snoyer told him that in eighteen years of experience he never encountered dishonesty by government officials at any level in the awarding of contracts and believed there were too many controls for it to occur. Nicodemus insisted however that "these things" occur, and he "confided instances" of "suspected" dishonesty. Snoyer thereupon became "instilled" with a growing suspicion as to procedures whereby Government contracts could be obtained. Nicodemus further said that should Snoyer ever see any evidence of such "things" going on, he wanted to know about it. (Snoyer (36) 176, 178-182, 233)

the meeting ended, and told to return to the F.B.I. to correct and sign the prepared statement, but, still badly shaken, he refused to sign. (Snoyer (36) 280-282) Also in the morning of June 8, Snoyer met with Justice Department personnel who instructed him to return to Los Angeles where he would be contacted by F.B.I. agents from that area. (Pet. 35a).

Snoyer returned to California, was contacted on Sunday, June 10, and met with F.B.I. agents on June 11 at their regional office in Santa Monica. (Pet 35a-36a) During this meeting the agents suggested they could record telephone calls with Schaeffer and Snoyer "allowed how that was a very fine idea." (Pet 37a) Pursuant to arrangements, Snoyer was always away from the office whenever a call came in, and Schaeffer was requested to leave a number where he could be reached.

Two calls were reecived on June 14, and, in each instance, Snoyer, following F.B.I. instructions, reported to the Santa Monica office to return the call. (Pet 38a; Snoyer (36) 338) Because of Snoyer's dissatisfaction with the distance involved, the F.B.I. rented an apartment across the street from his office from where all subsequent calls were made and taped through the same procedure. (Snoyer (36) 352-354, 368) The recording equipment used by the F.B.I. agents was a Magnecord PT6-A2H tape recorder consisting of a record play back amplified type PT 6 JF and a transport mechanism type PT6-A2H. A single pair of wires were attached to the incoming telephone pair at the connector block in the baseboard in the apartment and was connected to the "bridge" of the amplifier. This connecting block was located on the baseboard of the room in which the telephone was located and was about nine

feet from the telephone. (Appendix B, *infra*). A headset was attached to the tape recorder through which the agent could listen. This same procedure was used for all calls. (Colby (37) 2)

Fifteen telephone calls were recorded of which thirteen were overheard through the headset by an agent. These calls took place on June 14, 18, 19, 20, 21, 29, and July 2, 5, 9 and 11 of 1962. Except for one call to petitioner and one call to Tryon, each on June 20, both of which were taped, the remaining calls were to Schaeffer. (Colby (37) 2-3, 15). None of the telephone calls were overheard and recorded by the F.B.I. with the knowledge or consent of petitioner, Tryon or Schaeffer. All of the recordings were made with Snoyer's cooperation.

At the completion of the first call on June 14, the procedure followed then and generally thereafter was that Snoyer was given a paper to sign and upon which he wrote that he had given the agents permission to record the call; there was no discussion between them as to the contents of the call; the tape was not played back for Snoyer but was put in a tin can and kept in the possession of the F.B.I.; and Snoyer never heard the tapes played until November, 1963, when the trial was originally scheduled to get underway. (Snoyer (36) 334-337)

The overwhelming evidence supporting the alleged conspiracy and substantive charges was contained in the fifteen telephone conversations. On direct examination government witness Snoyer was asked and testified only to the "substance" of these fifteen conversations, para-

phrasing in damaging particulars.[4] (Snoyer (36) 30-58) The only direct testimony by Snoyer concerning F.B.I. participation in the phone calls occurred when he was asked what happened after he withdrew money from the bank, and he stated, "I went back to the apartment where the F.B.I. and I had been making these phone calls and gave this to them and they recorded the serial numbers." (Snoyer (36) 65) Snoyer, on cross-examination by Schaeffer's counsel, admitted that the phone calls had been intercepted as aforesaid. (Pet 36a - 37a; Snoyer (36) 370)

During the course of cross-examination Snoyer resumed the witness stand with typewritten transcripts of the fifteen intercepted calls. These transcripts had been prepared by the F.B.I. at some unspecified date, and were supplied to Snoyer by government counsel after court recess the prior evening. (Snoyer (36) 368-369) As cross-examination progressed, Snoyer would ask for and, over objections of counsel, was permitted to use the transcripts "to refresh his recollection" and to give testimony prejudicial to petitioner and his co-defendants; permission was likewise granted where government counsel objected to certain cross-examination unless Snoyer be allowed to use the transcripts to refresh recollection. (Snoyer (36) 371-376, 498-500, 506-507)

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[4]For example, regarding his call to Tryon on June 20, Snoyer testified (Snoyer (36) 39): As I recall it, I outlined to him the discussions we had had on these contracts and asked him whether I could really accept what Mr. Schaeffer was telling me as being factual. And he said, "Yes, you certainly can." And I said, "Well, can I accept these words that Mr. Laverick will truly do what he promised to do?" *I am paraphrasing to an extent now, you understand.* He said, "Well, why don't you call Bill directly and find out from him for yourself?" And so I called Mr. Laverick. (Emphasis added)

Subsequent to the Snoyer testimony, government witness William Colby, an F.B.I. agent, testified that he "participated" in the two telephone calls of June 20, 1962 made by Snoyer to Tryon and petitioner, in that he overheard such conversations by means of a headset connected to the tape recorder. (Colby (37) 2) Colby, over objections of defense counsel (Colby (37) 3-6, 9-13, 16), was permitted to read the two transcripts he had prepared of the conversations into evidence. Before starting, however, the agent stated that he had made certain corrections to the transcript; he had recently listened to the tapes and corrected anything that may have been in error, but all copies of the transcript had not been changed. The trial judge ruled that in view of the agent's recheck of the recordings, it would be best for him to read the corrected "accurate verbatim statement." (Colby (37) 19-21, 30-31) Accordingly, such prejudicial testimony was read into evidence. (Colby (37) 21 et seq.)

Petitioner, Tryon and Schaeffer each testified in their own defense. Government counsel extensively cross examined petitioner and Tryon with the transcripts of the recorded call each had with Snoyer. (Laverick (38) 71-76; Tryon (37) 381-392)

At the close of all the evidence, the trial judge charged the jury that it must determine the credibility of the witnesses in resolving the "sharp conflict in the testimony." (Pet 110a) In this regard the court reviewed certain of the testimony and the jury were reminded that there was "a series of telephone conversations" between Schaeffer and Snoyer "which were recorded by the F.B.I." The jury was further instructed that there "was also one telephone conversation between Mr. Snoyer and Mr. La-

verick which was recorded and one telephone conversation between Mr. Snoyer and Mr. Tryon which was recorded". (Pet 105a)

Petitioner, on July 20, 1962, received a notice of dismissal from his position at Fort Monmouth, where he had been employed since March, 1941, starting as a Junior Engineers. (Laverick (38) 15-16) He has been sentenced to prison for two years on Count I, and placed on two years probation each on Counts II and III, commencing at the completion of his prison sentence. (Pet 5a)

REASONS FOR GRANTING THE WRIT

1. The ruling of the trial judge allowing testimony by Agent Colby (and Snoyer) concerning the existence of and reading into evidence the transcripts of recorded telephone conversations involves important questions of statutory construction in the administration of Section 605 of the Federal Communications Act, Appendix A, *infra*. Such testimony was ruled admissible under the authority of *Rathbun* v. *United States*, 355 US 107. (Colby (37) 13-14) This, it is submitted, constitutes a misapplication and significantly improper extension of the Court's holding on this troublesome and recurring issue.

In *Rathbun*, the Court held admissible the testimony of police officers as to the contents of a telephone conversation they overheard, at the invitation and with the consent of the receiving party, on a regularly used telephone extension. In reaching its decision the Court noted the dispute in the lower courts as to *what* constitutes an unauthorized interception (p. 109, fns 4 and 5), but held that on the facts "in the case before us", there has been

no interception within the meaning of Section 605. The issue so carefully framed by the Court appears to have been limited to situations involving overhearing on a "normally used extension phone". Notwithstanding such limited phraseology, *Rathbun* has been extended to support admission into evidence of a recording of a conversation, obtained by means of an attachment to the extension phone specially installed as an aid to the eavesdropping. *Ferguson* v. *United States*, 307 F 2d 787 (CA 10)[6]; see also *Carnes* v. *United States*, 295 F 2d 598 (CA 5).

The trial court's ruling below goes far beyond the *Ferguson* extension of *Rathbun*. Here, rather than being attached to the extension phone, the recording equipment was wired to the "connector block" at the baseboard of the apartment, some nine feet from the telephone, and the headset, through which the agent overheard the conversations, was attached to the recorder. This differs significantly from the facts in *Rathbun*. And although the agent here overhear the conversations, he was permitted to read the transcripts of the recordings because he was not able to relate the conversations verbatim without the use of such transcripts. (Colby (37) 17-18)

Clarification by the Court is needed also on the equally troublesome and related question as to who is a "sender" within the meaning of Section 605, capable of authorizing an interception. The trial judge here in effect held that Snoyer, who placed the calls for the purpose

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[6]In support of its holding, the court in *Ferguson* relied upon certain "fundamental concepts" created by *Goldman* v. *United States*, 316 US 129; *Olmstead* v. *United States*, 277 US 438; and *On Lee* v. *United States*, 343 US 747, the vitality of which cases seem to have been dissipated by more recent decisions of the Court. *Lopez* v. *United States*, 373 US 427 (Brennen, J., dissenting).

of attempting to draw incriminating statements from petitioner, Tryon and Schaeffer, was the sender who could give the necessary consent. The lower courts, as it has already been noted (see also *Carnes, supra*, pp. 600-601) are divided on this question. Although it does not appear to have been directly decided by the Court, the *Rathbun* case again has been interpreted as holding that either party may give the necessary consent. In *Carnes, supra*, involving recordings of telephone conversations obtained through an attachment to the earpiece of the telephone, the court, relying on *Rathbun*, explained that "the Supreme Court scotched the theory that the consent of each party to a conversation must be obtained before a communication may be divulged" (p. 601). This conclusion, based upon dicta, clearly is unjustified and is read out of context. The Court in *Rathbun*, as we have seen, was careful to limit its decision to conversations overheard on a regularly used extension telephone. While observing that either party may record the communication and publish it, the Court went on to explain that when one uses the telephone in the normal manner, he impliedly, if not expressly, consents to such divulgence. He "takes the risk that the other party may have an extension telephone and may allow another to ovearhear the conversation" (pp 110,111). Thus, contrary to the interpretation in *Carnes*, it appears that *Rathbun* holds that each party to a telephone conversation is both a "sender" and receiver, who, while engaged in the normal usage of a telephone, impliedly, if not expressly, consents to the divulgence of the conversation by the other party, or by one on his behalf; in the absence of such normal usage, such as where there is an interception, the express consent of each such party would be required for divulgence. Under the facts of the

present case, there was no such normal usage and the necessary consent was missing.[7]

2. The purposes for which the agent was permitted to read into evidence the transcripts of the recorded conversations, and the use made of such transcripts by Snoyer on cross-examination, are not constitutionally permissible and this Court, consequently, should exercise its supervisory powers to insure the fair administration of criminal justice herein.

This case, in principle, is indistinguishable from *On Lee* v. *United States*, 343 US 747, which although not yet overruled, has been roundly condemned. *Lopez* v. *United* States, 373 US 427 (Warren, C.J. concurring, p. 441; Brennen, J. dissenting, p. 446 et seq.). In *On Lee*, the government, faced with unreliable testimony of an alleged accomplice, equipped one Chin Poy, a former employee and friend of On Lee, with a concealed transmitter and sent him into On Lee's laundry to engage in conversation for the purpose of eliciting admissions that On Lee was part of an opium syndicate. At the trial, instead of calling Chin Poy to testify, the government put on the narcotics agent who was on the receiving end of the radio contact to testify to the admissions made by On Lee, testimony that led directly to conviction.

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[7]Assuming arguendo that the consent of only one party is sufficient, it is indeed questionable whether consent was voluntarily given. The alleged consent here was first given at a time when Snoyer admittedly was still "badly shaken" following his meeting with the F. B. I. in Washington, where he was roughly and rudely treated, was upset and unsure of himself, and was repeatedly threatened with prosecution in the event any of his statements to the F. B. I. were untrue. Consent given under such circumstances does not appear to be the voluntary consent required under the statute, but a forced consent of the type condemned by this Court in *Weiss* v. *United States*, 308 US 321, 329-331.

There was one minor difference between the facts of this case and *On Lee*. Snoyer, unlike Chin Poy, did testify, although his testimony at the express directions of government counsel was limited merely to the "substance" of the fifteen telephone conversations, some of which he paraphrased in damaging particulars. Snoyer thereafter, was subjected to extensive cross-examination which raised reasonable doubts as to the guilt of petitioner[8] and his alleged co-conspirators. However, similar to *On Lee*, the government then called F.B.I. agent Colby to read into evidence the transcripts of the recorded conversations of Snoyer with petitioner and Tryon. This evidence by the agent constituted "a vital part of the prosecutor's proof" (*Nardone* v. *United States* 302 US 379, 380), and, unlike the situation in *Lopez* v. *United States, supra*, was not used by the government to corroborate the testimony of Snoyer, but rather, to obviate the need to have Snoyer, the instigating party to the calls, testify with specificity as to the telephone conversation.[9] Indeed, government counsel was careful to avoid having Snoyer even testify on direct examination that such conversations had been intercepted

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[8]Despite Snoyer's testimony as to petitioner's guilty conduct, the government's own evidence revealed that on June 22, 1962, two days *after* the telephone call by Snoyer to petitioner, the petitioner, contrary to Snoyer's testimony of petitioner's intentions, made absolutely no attempt to "overrule" any of his subordinates, and, in fact, had continued his prior recommendation of rejection of Snoyer's corporation for a government contract, as evidenced by the Technical Ability Evaluation on Consad Corporation, dated June 18, 1962. (Govt 96b)

[9]Further unlike the *Lopez* case, involving the introduction in evidence of a wire recording which was concededly "an accurate version of a conversation" (p. 439), the versions of the conversations here were contained in transcripts prepared by the agent from the recordings. The government did not offer the recordings themselves. Subsequent to preparing the original transcripts, the agent rechecked the recordings and made various corrections to the transcripts, so that they would be an "accurate verbatim statement" of the subject conversations.

and recorded. The net result of this deliberate governmental tactic, permitted over objections of counsel (Colby (37) 10), was greatly prejudicial to petitioner, and in effect dignified what might have otherwise been suspect credibility of the main government witness as to other testimony.

Moreover, the government strategy here was even more unfair to petitioner than that in *On Lee*. Snoyer, on direct examination, alluded only to calls he and the F.B.I. had made to petitioner and his co-defendants, but on cross-examination admitted that all fifteen calls had been intercepted and recorded.[10] Subsequently, during continued cross-examination, he was supplied by government counsel with all fifteen transcripts allegedly for the purpose of refreshing his recollection. However, having armed Snoyer with such transcripts, in full view of the jury, the government was able to shift to the defense the onus of trying to impeach the witness with respect to the contents of such conversations, with the added danger, as actually became the case, of having damaging portions of such conversations brought out which overshadowed parts favorable to the defense. By the same token, the government in effect had the full benefit of the recordings of the Schaeffer conversations without having to introduce same.

Thus the government was able to radically shift the pattern of presentation of evidence in a criminal trial, thereby concealing substantial factual and legal issues

[10]Defense counsel had previously been advised by the government, out of the jury's presence, that such interceptions had been made and were allowed to hear the recordings in the court's chambers. It was counsel's understanding, however, that the government did not intend to use the recordings during the trial.

concerning the rights of the accused in the administration of criminal justice. Compare *Lopez* v. *United States, supra* (Warren, C.J., concurring, pp 441 et seq.)

3. The petitioner's right under the Fourth and Fifth Amendments to the Federal Constitution were violated by the ruling of the trial judge in allowing the F.B.I. agent, over objections, to read into evidence the transcripts of the telephone conversations which he prepared from the recordings of such telephone calls made without the knowledge or consent of petitioner or his co-defendants.

Such transcripts, whether "corrected" or as originally prepared by the agent, were the fruits of an illegal electronic surveillance which, though intangible, are nevertheless within the protectice sphere of the Fourth Amendment (*Irvine* v. *California*, 347 US 128), and as such were improperly allowed to be read into evidence. *Silverman* v. *United States*, 365 US 505. For this and other reasons of constitutional proportions discussed in the concurring and dissenting opinions in *Lopez* v. *United States, supra*, it is respectfully submitted that the Court should reverse the judgment of the courts below.

Again, as in the past *(Silverman*, p. 508), it is respectfully submitted that the Court should reconsider its decisions in *Olmstead*, *Goldman*, and *On Lee*, or at least re-examine them so as to clearly outline for the courts and citizenry the protective spheres of the Fourth and Fifth Amendments in this age of electronic marvels. It seems safe to say that the "frightening paraphenalia" referred to in *Silverman* (pp 508-509), may today be out-

moded[11], and the need for the Court to speak out on the continued vicious infringement of one's Constitutional rights is greater than ever.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted

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[11]See e.g., "Invasion of Privacy (Government Agencies)", Hearings before the Subcommittee on Administrative Practice and Procedure of the Committee on the Judiciary, United States Senate, presently being carried on.

APPENDIX A

CONSTITUTION AND STATUTES INVOLVED

UNITED STATES CONSTITUTION

AMENDMENT IV

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATUTES

Title 47, United States Code
Section 605

* * * [N]o person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such in-

tercepted communication to any person; * * * and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: * * *. [48 Stat. 1103]

APPENDIX B

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1965

WILLIAM J. LAVERICK,

Petitioner

v.

UNITED STATES OF AMERICA

BEFORE ME, the undersigned authority, duly authorized to administer oaths and take acknowledgements, personally appeared GEORGE ELIAS, JR., who, after being first duly sworn, deposes and says:

That he has been retained as counsel for Petitioner for the purpose of preparing and filing a petition for writ of certorari in the matter designated as William J. Laverick, Petitioner, v. United States of America, October Term 1965, No. _____.

That following an examination of the record below, and consultations with defense counsel below and the office of the United States Attorney for the District of New Jersey, it appears that no stenographic report was made of the evidence concerning the manner, procedure and type of electronic or mechanical equipment used by agents of the Federal Bureau of Investigation to tape record certain telephone conversation during the period

of June 14, 1962 through July 11, 1962, between Robert S. Snoyer and the defendants-appellants in the courts below: William J. Laverick, Harrison F. Tryon, and Malcolm Schaeffer *(United States of America, Plaintiff,* v. *William J. Laverick, et al, Defendants,* District of New Jersey, Criminal #537-62), the transcripts of some of which recorded conversations were read into evidence on behalf of the Government. However, the office of the United States Attorney advised affiant that evidence relative to the manner, procedure and type of equipment used is contained in the "Statement of Facts" of the MEMORANDUM OF LAW submitted by the Government in support of admissibility of such evidence during the trial of this cause, and filed with the Honorable Robert Shaw, United States District Judge for the District of New Jersey, the contents of which "Statement" were thereafter relied upon by the defendants in their MEMORANDUM OF LAW in opposition thereto which reads as follows:

STATEMENT OF FACTS

This case was initiated when Robert S. Snoyer voluntarily gave a statement to the F.B.I. in Washington on June 8, 1962. As a result of this statement, arrangements were made to record conversations which he had with the defendants in the case at bar. The recording equipment used by the F.B.I. agents was a Magnecord PT6-A2H tape recorder consisting of a record play back amplified type PT 6 JF and a transport mechanism type PT6-A2H.

A single pair of wires were attached to the incoming telephone pair at the connector block in the baseboard in the apartment and was connected to the "bridge" of the amplifier. This connecting block is located on the base-

board of the room in which the telephone is located and is about nine feet from it.

Recordings were made of conversations between Snoyer and Schaeffer, Snoyer and Laverick; and Snoyer and Tryon. All of these recordings were made with Snoyer's full knowledge, cooperation and consent.

George Elias, Jr.

George Elias, Jr.
Attorney for Petitioner
12th Floor, Concord Building
Miami, Florida 33130

SWORN to and subscribed before me this 10 day of September, 1965.

Notary Public

My Commission expires:

NOTARY PUBLIC, STATE of FLORIDA at LARGE
MY COMMISSION EXPIRES JULY. 23, 1967
BONDED THROUGH FRED W. DIESTELHORST

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

Nos. 14874, 14875 AND 14876

UNITED STATES OF AMERICA

v.

WILLIAM J. LAVERICK,
HARRISON F. TRYON AND
MALCOLM SCHAEFFER.

WILLIAM J. LAVERICK,
Appellant in No. 14874

HARRISON F. TRYON,
Appellant in No. 14875

MALCOLM SCHAEFFER,
Appellant in No. 14876

Appeals From the United States District Court for the District of New Jersey

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Argued November 19, 1964

Before STALEY, GANEY and FREEDMAN,
Circuit Judges.

OPINION OF THE COURT

(Filed July 15, 1965)

By GANEY, *Circuit Judge.*

This Consolidated appeal comes before the Court for review of the conviction of three defendants under Sections 2, 202, 281 and 371 of Title 18, United States Code.[1]

The parties involved are defendant, William J. Laverick, a former Government employee, in charge of a department at Fort Monmouth, New Jersey, whose responsibility it was to certify the technical ability and plant capacity of firms bidding on Signal Corps' contracts and to approve any technical changes in contract specifications. The approval of this department was a prerequisite to receiving an award. Defendant, Harrison F. Tryon, was chief of the Logistics Engineering Division at Fort Monmouth and was a direct subordinate of Laverick's, as well as the custodian of lists containing the specifications of all component parts used in these contracts. Defendant, Malcolm Schaeffer, was a former employee of Laverick's department and later a manufacturer's representative of

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[1]The relevant provisions are as follows:

§ 2 Title 18 U.S.C. provides that one who aids or abets the commission of a crime is guilty as a principal.

§ 202 Title 18 U.S.C. proscribes the receipt of money by an employee of the United States with the intent to have his decision influenced with regard to a matter before him in his official capacity.

§ 281 Title 18 U.S.C. punishes an employee of the United States who accepts compensation for services which he renders in relation to a matter in which the United States has an interest, before an agency of the United States.

§ 371 Title 18 U.S.C. prohibits any conspiracy to commit an offense against the United States.

Consad, Inc., in their attempts to secure contracts with the Government at Fort Monmouth, New Jersey, from March through May 26, 1962, when a retainer of $250 per month was cancelled, but nevertheless, Consad continued getting in touch with him thereafter. Consad, Inc., was an electronic components manufacturer which had, at the time of the alleged crime, a series of bids pending before the Signal Corps at Fort Monmouth, New Jersey. Consad, Inc., had experienced great difficulty in obtaining Government contracts because of its inability to convince the Signal Corps of its capacity to manufacture the finished product.

The facts, briefly stated, are as follows:

Robert Snoyer was president of Consad, Inc., and on June 6, 1962, was in New York City when he received a wire from his office in Santa Monica, California, concerning a certain bid his company then had pending at Fort Monmouth, New Jersey. In order to obtain the requested information, Snoyer attempted to get in touch with his Santa Monica plant, as well as his Monterey plant in California, but was unable to find anyone at either place who could give him the requisite information. He then called the defendant, Schaeffer, at Fort Monmouth, and told him of the wire he had received, and asked him to check into the matter and see if he could identify the equipment. Schaeffer called back, identifying the equipment, which had an established value of approximately $2,500,000, and Schaeffer indicated that Snoyer would have the same difficulty he had had in the past with the people at Fort Monmouth, and told him that if he hoped to obtain any business, he would need the help of certain people at Fort Monmouth, and that for a fee of 2% of the contract price he could expect to receive all the approvals necessary to

obtain the contract. Snoyer told him that he would want to meet the principals involved who could deliver the contracts and the approvals. Schaeffer told Snoyer that he would come to New York the next morning and he would introduce him to Laverick who was the one who could be most helpful in securing the contract. Schaeffer came to New York on June 7, 1962, and he and Snoyer drove down to Laverick's home and there Snoyer asked Laverick to confirm Schaeffer's statement that what he told him was true and Laverick replied, indicating Schaeffer, "You do what Muggsy tells you to do and everything will be O.K. . . ." To this, Snoyer answered, "All right." Later, when they were about to leave, Snoyer being somewhat doubtful about the money concerned, since on the way down to Laverick's home Schaeffer had reduced the price from 2% of $2,500,000, or $48,000.00, to $20,000.00 as the amount of the payment, and therefore asked Schaffer whether Laverick knew about this and was still willing to go through with the deal. Schaeffer thereupon walked apart from Snoyer and whispered something to Laverick which Snoyer testified he could not overhear, but that he heard Laverick's reply, "Yes, you're damn right I will.", and Schaeffer, upon returning to Snoyer, came back and said, "You heard him, so everything is O.K."

Schaffer then drove Snoyer to Philadelphia, and on the way over, he advised Snoyer to call him the next day and he would tell him what he had to do in California, in order to pass the survey which was necessary for the approval of the contract. Schaeffer and Snoyer also had a discussion on how the tax problem on the money to be paid should be avoided and Schaeffer advised Snoyer that it would be necessary for him to take care of his (Schaeffer's) taxes, inasmuch as Schaeffer insisted that the money

was to be paid directly to him and he would make the proper disposition thereof.

From Philadelphia, Snoyer proceeded to Washington, where he confided what had transpired to one Nicodemus, a newspaper reporter, who had been making a study of procurement orders, who told him to contact the F.B.I., which Snoyer did, and, after five hours discussion with the F.B.I., Snoyer left for California, without signing any statement of the conversation which had ensued.

Snoyer called the next day and was told by Schaeffer that he was sending some documents to him which would be very helpful for the company when the survey team came from Fort Monmouth and arrived at Consad's plant. After Snoyer's arrival in California, he was contacted by the F.B.I. of Los Angeles, and he reported to them that he had received a package from Schaeffer which he brought to the Santa Monica office of the F.B.I. and it was found to contain some provisioning lists and item description lists taken from Signal Corps' files. Further testimony showed that these lists were not open to the public, were confidential, and were given to the defendant, Laverick, by the defendant, Tryon ,through Tryon's secretary.

After the receipt of these documents by Consad in California, which were sent by Schaeffer and taken to the offiice of the F.B.I., a series of telephone conversations were had between Schaeffer and Snoyer, which were recorded by the F.B.I., as well as telephone conversations between Snoyer and Laverick and Snoyer and Tryon. These conversations occurred between June 14th and July 11th, and during one such conversation between Schaeffer and Snoyer, Schaeffer advised Snoyer that he should bring

East with him between $4,500.00 and $5,000.00 in cash to be paid by Schaeffer to four people at Fort Monmouth. Snoyer, however, wanted to meet the principals to whom the money was to be paid and Schaeffer was unwilling, saying that he would distribute the same. However, Snoyer withdrew $3,000.00 from the bank and came East with Agent Stein of the F.B.I., the money being identified at the Newark office of the F.B.I., and placed in envelopes, one of which contained an amount of $850.00, the other $750.00. The testimony shows that the F.B.I. gave no instructions to Snoyer other than he was not to give the envelope containing the money to anyone unless the one receiving it knew it was money and that there was some basis for the payment of it.

Between June 8th, and June 12th, a survey team, under one Mayerson, visited the Consad plant in California, and made a technical ability evaluation to determine whether it could technically produce the equipment upon which it had bid. A report was filed by the survey team, under Mayerson, stating that Consad was not qualified, and Laverick, though he had authority to overrule the report, did not so do. Snoyer, at this time was unaware of this conduct on Laverick's part. The Contractor Evaluation Board, the highest authority with respect to contracts of this nature, also approved the report. Later, Snoyer, upon learning of the unfavorable report which the survey team had made, was assured on or about June 15th, by Schaeffer that certain of the information of the survey team was in error and told Snoyer, "Well, don't worry about that because Bill will overrule them. Don't concern yourself with it." He also advised Snoyer that there were various details that were wrong with Consad's facilities and that was the reason they could not give technical approval, but

Schaeffer again assured Snoyer, ". . . that these people would be overruled."

An F.B.I. Agent, Colby, testified to a telephone conversation between Snoyer and Tryon on June 20th, in which Tryon stated he was familiar with the entire matter and that he would be able to help Consad after the award was made and that he had already helped, to some extent, with Schaeffer. On July 12, 1962, arrangements were made by Schaeffer for Snoyer to have dinner at the Shadow-Brook Restaurant in Shrewsbury, New Jersey, with Tryon and Laverick and other Fort Monmouth personnel. Snoyer testified, however, that at this meeting Laverick assured Snoyer that the Small Business Administration, which had authority to overrule everything which had gone on before, would grant Consad a Certificate of Competency. He, additionally, assured Snoyer that he was helping all he could with Consad, as was Tryon, and when they had secured the contract, he would make it profitable by ordering spare parts. Snoyer testified that out of the presence of the other persons, he showed Schaeffer the cash he had brought by exhibiting the envelopes containing the cash to him. Schaeffer, likewise, knew at this meeting that the survey team had reported that Consad was technically unqualified to perform the work under their bid. Later in the evening at the Shadow-Brook Restaurant, when Snoyer visited the men's room with Laverick, upon leaving he handed one of the envelopes to Laverick which contained the cash and asked him if he thought he deserved it and Laverick said, "Yes." Later, Snoyer took the defendant, Tryon, aside in the bar, showed him the envelope with the money in it and asked him if he thought he deserved it and he answered, "Yes." Snoyer than gave the envelope to him and Tryon folded it and put it in his pocket. Imme-

diately upon defendants leaving the restaurant, they were arrested which, as has been indicated, was on July 12, 1962.

This evidence was presented to the jury, the defendants moved for judgments of acquittal after the Government's case and also after their own case had been presented and both of these motions were denied. After summation of counsel, the case was submitted to the jury which rendered a verdict for the Government and against all three defendants. A motion for a new trial was denied on February 26, 1964, and this appeal followed.

The first reason advanced by the defendants for the new trial is that the charge of the court on entrapment was improper because (1) it did not make any reference as to whether or not there was any "predisposition" on the part of the defendants to commit the crime charged; (2) that the charge of the court with respect to Snoyer being a Government agent was insufficient, and, finally, that the court's use of the phrases "lawful entrapment" and "unlawful entrapment" was prejudicial to the defendant.

At the outset, it may be stated that a careful review of the record indicates plainly that there was no necessity for the court to charge with respect to entrapment. The record clearly shows that the unlawful scheme was conceived in the minds of the defendants, Schaeffer and Laverick, and materially aided by Tryon, and presented to Snoyer, and that everything thereafter done by Snoyer, in cooperation with the F.B.I. agents, was only taking advantage of an opportunity for wrongdoing that they presented and afforded.

While defendants, in their argument and brief, admitted that they do not set out effectively their objection to the court's charge on entrapment, they now assert that the court was in error in not using the specific word "predisposition" in setting forth the requisite state of mind that should obtain on the part of the defendants in any case of entrapment. However, it is plain that the trial court, in explaining the law of entrapment to the jury, was not bound to use any specific word and, while the court did not mention "predisposition", it did use phrases such as "implants in the mind of an otherwise innocent person", "already disposed . . .", as well as "already has the readiness and willingness to break the law", and similar phrases synonymous therewith. It is obvious that these phrases throughout the court's charge were interchangeable with the specific word "predisposition".

Furthermore, the court stated as follows:

> "You are instructed that entrapment is present when the criminal design originates with an officer or agent of the Government and he implants in the mind of an otherwise innocent person the disposition to commit the offense and induces its commission in order to create the grounds for prosecution. You are further instructed that entrapment is not present when the criminal intent originates in the mind of a person already disposed to the commission of an offense, and the officer or agent of the Government does nothing more than afford that person the opportunity to commit the offense."

Furthermore,

> "By way of summary as to this defense of entrapment, I charge you that the law recognizes two kinds of entrapment, unlawful entrapment and lawful entrapment. Where a person has no previous intent or purpose to violate the law, but is induced or persuaded by a law enforcement officer to commit a crime, he is entitled to the defense of unlawful entrapment because, as I have mentioned, the law as a matter of public policy forbids a conviction in such a case, but on the other hand if a person already has the readiness and willingness to break the law, the mere fact that Government agents provided a favorable opportunity is no defense. This is lawful entrapment."

With respect to the second assertion that the charge with respect to Snoyer being a Government agent was insufficient, it is likewise without foundation. It is obvious that a private individual may only be an entrapping party when an agency relationship exists between himself and the Government. The record herein displays no evidence to support any agency relationship between the Government and Snoyer at the time of the formation of the nefarious scheme and the court's detailed charge, concerning when entrapment is perpetrated by an officer or agent of the Government, was as full and complete as the record warranted. Additionally, a long and intensive cross-examination of Snoyer by defense counsel elicited nothing which could possibly be construed as making Snoyer a Government agent in any entrapment proceeding. This for the reason that Snoyer had no relationship with any Gov-

ernment official until after Schaeffer solicited the payment of money to him, and it is uncontradicted that Schaeffer arranged the meeting with Laverick at his home at which time the plan was perfected and which Tryon later on materially aided.

With respect to the third contention, while the adjectives "unlawful" and "lawful" entrapment might have been somewhat of an over-portrayal in describing the conditions requisite for entrapment, nevertheless, the thought clearly and carefully embodies that which is necessary and proper under the law. *Sherman v. United States*, 356 U.S. 369; *Accardi v. United States*, 257 F. 2d 168; *Park v. United States*, 238 F. 2d 253; *United States v. Romano*, 278 F. 2d 202. Accordingly, it is obvious that the phrases "lawful entrapment" and "unlawful entrapment" comport with the language used by many appellate courts in describing entrapment and the trial court's charge with respect thereto was clear and sufficient.

The basis for the defendant's averment of entrapment, as has been indicated, is that Snoyer sought to lure the defendants into the wrongdoing in order to justify Consad's lack of success in obtaining the Government contracts. All of the facts, as we shall point out in connection therewith, were before the jury and Snoyer vigorously denied any assertion of allurement on his part, or that the telephone calls in July, previously adverted to, were designed with any thought of entrapment. These telephone conversations, in their entirety, show beyond a doubt that they belie any theory of entrapment on the part of Snoyer as a Government agent, but clearly point up only part of strategem used to afford an opportunity for all of the three defendants to carry out their scheme of wrongdoing. As has

been indicated above, the nefarious scheme was broached and implanted in Snoyer's mind by the defendant, Schaeffer, on June 6, 1962, when he stated that for a fee of 2% of the contract price, Snoyer could expect to receive the favorable approval at Monmouth which was necessary to the securance of the contract, all of which was aided and abetted by Laverick and Tryon, as herein indicated, and, accordingly, it cannot be reiterated too often that all the F.B.I. did was to afford an opportunity through Snoyer for the defendants to commit the crime charged.

Another argument advanced by the defendant is that the charge of the court, in its summary, was one-sided and emphasized the Government's case to the exclusion of the defendant's case. Here, there was no objection to the court's charge with respect thereto at the close of the case and whatever warrant there is to this assertion must be found under the Plain Error Rule of Rule 30. There was denial by the defendants of all the allegations of the Government's witnesses and the contentions of both parties were properly laid before the jury, and a careful scrutiny of the record shows no prejudice in the court's charge, for it is abundantly clear that the court lent equal weight to both the evidence produced by the Government, as well as that produced by the defendants.

The next objection raised by the defendant is that the court permitted certain questions to be addressed to the defendant, Laverick, which were prejudicial to him before the jury. One of the objected areas involved the cross-examination of Laverick with respect to his savings account and investments, while the other dealt with his ownership of a race horse. However a reading of the record shows that on direct-examination Laverick was questioned

as to his financial situation and opened the door for the questions posed on cross-examination and were asked to test his credibility with respect to his financial situation and, accordingly, proper. The facts in this case pose nothing of the situation presented in *Berger v. United States*, 295 U.S. 78, at 84, where the Government exceeded the bounds of cross-examination in large measure by permitting to go to the jury incompetent hearsay evidence. There was ample basis here for the cross-examination involved. Again here, it was the defendant's own objection which prevented the Government from proving the allegations in connection with his large purchases of stock and a race horse and, accordingly, no prejudice resulted since the court, in its charge, said: "I further charge you that whenever the Court has sustained an objection to the question you may draw no inference from the wording of that question or speculate as to what the witness would have said if permitted to answer, nor can you assume that any party has objected to a question because that side expected the answer, if any, to be unfavorable." Accordingly, if any prejudice could have properly accrued to the defendant by this question, it was cured by the court's charge.

Finally, certain objections were raised as to the sufficiency of the indictment. However, an indictment should be construed broadly in favor of the Government after a verdict has been rendered thereon. *Hagner v. United States*, 285 U.S. 427, at 431. This rule is particularly applicable here where the defendant made no specific objection to the indictment by means of any pre-trial motion. However, objection is urged to the indictment here that it was insufficient, in that each count in Count I and II alleged the statutory offense in the disjunctive or alter-

native. Here again, counsel is urging, for the first time, this specific objection. The cases are unanimous in holding that merely technical defects are waived when no objection is made to them at trial. Rule 12(b) (2). What is really here adverted to is that the indictment is duplicitous, to which the Government answered that there is, in fact, no duplicity, nor did any ever exist, as there is no danger in the allegations that a conviction or acquittal of the defendants would fail to bar a subsequent criminal prosecution on the grounds of double jeopardy. The essence of the crime here charged is the receiving of the money, not the quid pro quo received or promised for that money, and where the statutes use the disjunctive to described the alternate means of committing the same statutory offense and only one crime is charged, the means of commission are permissible. *United States v. Johnson*, 207 F. 2d 314.

The other reasons asserted for a new trial are without merit.

The judgment of the District Court will be affirmed.

A True Copy:

Teste:
Clerk of the United States Court of Appeals for the Third Circuit.